FR

10/11/04

THE HIGH COURT OF SIKKIM : GANGTOK

Regular First Appeal No.2 of 2004

In the matter of an appeal against the judgment and decree dated 29.9.2003 passed by the District Judge (East and North) at Gangtok in Civil Suit No.20 of 2003.

and

In the matter of

Meena Thapa,
W/o K. B. Pradhan,
R/o Development Area,
P.O. & P.S. Gangtok,
East Sikkim ..... ***Appellant***

Versus

L. B. Pradhan,
S/o Late Kabi Raj Pradhan,
R/o Development Area,
P.O. & P. S. Gangtok,
East Sikkim ..... ***Respondent***

For Appellant : A. K. Upadhyaya, S. Pradhan and Sharmila Lama, Advocates.

For Respondent : S. S. Hamal and Norden Tshering, Advocates.

Present : The Hon'ble Shri Justice, A. P. Subba, Judge.

Date of hearing : 13th October, 2004.
Date of judgment : 10th November, 2004.

10/11/04

JUDGMENT

A.P. Subba, J.

This appeal is directed against the judgment and decree dated 29.9.2003 passed by the learned District Judge, East and North at Gangtok in Civil Suit No.20 of 2003, whereby the plaintiff's suit was decreed for the ejectment of the defendant/appellant from the suit premises.

2. The facts of the case, in a nutshell, are that the plaintiff-respondent inducted the defendant/appellant as a tenant in respect of suit premises comprising of six rooms with two attached bath rooms with toilet on the second floor of his five storied RCC building situated at Development Area, with effect from 1.6.1994 on a monthly rent of Rs.2,000/-. The tenancy was a monthly tenancy and the rent for each month was payable on the expiry of the month and within the first week of the following month. The defendant/appellant was a regular defaulter in payment of rent from the very inception of the tenancy and, as a result, an amount of Rs.1,25,000.00 being the total monthly rent from 1.9.1994 to 31.11.2001 after adjustment for the payments made fell into arrears. Besides being the defaulter in payment of rent, the defendant/appellant also substantially altered and changed portion of the suit premises without any permission from the plaintiff/respondent. Further, the suit premises being in the state of disarray and dilapidated condition for want of proper

10/7/11/09

maintenance are in need of urgent repair and overhauling. When the defendant neglected to pay the monthly rents which fell into arrears for long period, the plaintiff requested the defendant to vacate the suit premises and also issued legal notice. However, in spite of the receipt of the legal notice, the defendant failed to vacate the suit premises and to pay the arrears of rent as per the demand. Hence, the suit for eviction, recovery of arrear rents and other reliefs was brought against the defendant. So far as the recovery of the arrears is concerned, the plaintiff/respondent prayed for recovery of arrears of Rs.16,000/- only being the arrear rent from April, 2001 to November, 2001.

3. The defendant/appellant contested the suit by filing a written statement, wherein it was denied that the plaintiff/respondent was the owner of the suit premises and the defendant/appellant was the tenant under him. It was contended that the defendant/appellant had purchased the suit premises from the plaintiff/respondent at a consideration value of Rs.3 lakhs in the year 1992 and by virtue of such purchase, she had become the owner of the suit premises. After the finalisation of the purchase agreement, the defendant/appellant paid Rs.2,95,000.00 to the plaintiff/respondent in different instalments between September, 1992 and October, 1994, out of the total amount of Rs.3 lakhs, and requested the plaintiff/respondent to execute the sale deed in respect of the suit premises in favour of the defendant/appellant on a number of occasions, but the

plaintiff/respondent put off the matter on one pretext or the other. Accordingly, the defendant/appellant claimed to be the owner in possession of the suit premises since 1992. Further case of the defendant/appellant was that after purchase of the suit premises, she renovated the entire premises at a cost of Rs.45,000/- within a period of three months and as such the averment that the suit premises were in dilapidated condition was false and baseless. It was also denied that the plaintiff/respondent requires the suit premises for his bona fide use and occupation.

4. On the basis of the above pleadings, the following issues were framed by the trial Court :-

(1) Whether the defendant is a tenant of the plaintiff in respect of the suit premises ?

(2) Whether the defendant is a defaulter in the payment of rent in respect of the suit premises from the month of April, 2001 to November, 2001 ?

(3) Whether the plaintiff requires the suit premises for his bona fide use and occupation ?

(4) Whether the defendant has made alterations in the suit premises without the consent in writing of the plaintiff ?

(5) Whether the suit premises is in need of thorough over hauling ?

(6) Whether the plaintiff is entitled to mesne profits at the rate of Rs.200/- per month with effect from 2.12.2002 onwards ?

(7) To what relief or reliefs, if any, is the plaintiff entitled?

5. Both the parties examined themselves as the only witnesses in support of their respective cases. After considering

the facts and evidence brought on record, and after hearing the parties, the learned trial court came to the conclusion that the defendant was a tenant in respect of the suit premises, that the plaintiff required the suit premises for his bona fide use and occupation and that the defendant had made alterations in the suit premises without the consent of the plaintiff. The findings on other issues were against the plaintiff. However, on the basis of these findings which were in favour of the plaintiff the learned trial court came to the conclusion that the plaintiff had proved his case and accordingly decreed the suit of the plaintiff for eviction of the defendant from the suit premises.

6. Being aggrieved by the above order and decree of the learned trial court, the defendant/appellant has preferred the present appeal.

7. It is pertinent to mention at the outset that even though the defendant/appellant had pleaded and pressed number of grounds including the claim that she had become the owner of the suit premises by virtue of the purchase before the trial Court, Shri A. K. Upadhyaya, learned counsel for the defendant/appellant at the hearing, made it clear that he was confining his submissions to the finding on the issue of bona fide requirement only in this appeal by abandoning other grounds. The submission of the learned counsel in this regard is that, the pleading of the plaintiff regarding the bona fide requirement is scanty and not sufficient in so far as the plaintiff had not set out

his need in his pleadings on the basis of which it could be said that the need of the plaintiff/respondent is bona fide. Shri S. S. Hamal, learned counsel for the plaintiff/respondent, on the other hand, submitted that the defendant/appellant had not effectively controverted the plea of the bona fide requirement in the W/S as well as in the evidence and, as such, there is no basis on which the finding of the learned trial Court on the issue in question can be challenged.

8. In order to appreciate the rival contentions of the parties, it is necessary to refer to the relevant materials on record.

9. A perusal of the plaint shows that the requirement of bona fide use and occupation has been pleaded in paragraph 6 of the plaint. It has been stated therein that the plaintiff is a retired government servant and in his old age has to perforce live in a small space with his married son at Tadong, East Sikkim with great difficulty. This averment has been denied by the defendant in paragraph 12 of the written statement wherein it has been stated that the defendant denies the statement contained in paragraph 6 of the plaint.

10. The question for determination is whether the plaintiff-respondent has been able to establish the bona fide requirement as pleaded by him.

11. It is no doubt true that for the purpose of proving bona fide requirement it is not enough for the landlord to say that he needs the suit premises. This Court in ***Pal Sangay versus***

Mahabir Agarwal 1978 (2) SLJ - 21 after referring to various decisions has observed that it would not be enough for the landlord merely to state that he requires the suit premises. It is incumbent upon the plaintiff to show that the requirement is for bona fide occupation, i.e., the need or necessity for such occupation is genuine and honest. It has been observed as follows :-

> ***"The test which has to be applied is an objective test and not a subjective one and merely because a landlord asserts that he wants the accommodation for the purpose of starting or continuing his business, that would not be enough to establish that he requires it for the purpose and that his requirement is bonafide."***

12. In ***T. Sivasubramaniam & Others Versus Kasinath Pujari & Others (1999) 7 SCC 275,*** the Hon'ble Supreme Court in paragraph 4 of the judgment has observed that, when a landlord desires the tenanted premises, the requirement of law is that the landlord must set out his need for the premises in his petition and establish that such a need is bona fide. The need must be bona fide, genuine, honest and conceived in good faith.

13. It is, therefore, clear that in a case for a bona fide requirement the landlord must set out his need for the premises in his petition and establish that such a need is bona fide.

14. In the present case the plaintiff/respondent's plea as set out in the plaint is that he is a retired government servant and in his old age he has been forced to live in a small space in the

17/11/04

house of his married son at Tadong with great difficulty. In his affidavit evidence the plaintiff-respondent has stated that he has been sharing a small space in the house of his married son. Since his son has a big family he is deprived of the privacy and comfort of his own house in his old age which he can have only when the suit premises are vacated and possession thereof is handed over to him by the defendant appellant. As against such pleading and the evidence adduced by the plaintiff there is nothing by way of effective denial or contradiction of the claim of the plaintiff that he requires the suit premises for his bona fide use and occupation in the pleading of the defendant appellant as well as in the affidavit evidence filed by her. The bald statement that the averment is denied in absence of requisite details does not seem to be sufficient for rebuttal of the plea of bona fide requirement taken in the plaint. Besides, the statement made in the affidavit evidence has not been controverted in the cross-examination.

The pleading and the evidence highlighted above leave no room for doubt that the plaintiff has been forced to share a small space with his married son who has a big family and as such he requires the suit premises for his personal use and occupation. Thus it is difficult to agree with the learned counsel for the defendant appellant that the pleading in this regard is scanty and the evidence adduced thereof is not sufficient to substantiate the plea of bona fide requirement.

15. In ***Sarla Ahuja versus United India Insurance Co.Ltd. AIR 1999 S.C.100*** the Hon'ble Supreme Court has held that when the landlord shows a prima facie case a presumption that the requirement of the landlord is genuine is available to be drawn and while deciding the question of bona fides of the requirement of the landlord, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself.

16. In view of the above the plaintiff-respondent must be taken to have clearly set out his need in his pleading and also to have duly substantiated the same by his statement in the affidavit evidence.

17. Under Section 4 of the Gangtok Rent Control and Eviction Act, 1956 bona fide occupation of the landlord or his dependants is one of the grounds of eviction of a tenant, other grounds being thorough overhauling, and default for payment of rent for four months and more. This Court in ***Smt. Shakuntala Vaid versus K. N. Dewan, Vol.I SLJ 1977 page 33*** which was a case under Gangtok Rent Control and Eviction Act, 1956 has held that the landlord can have the building vacated if it is required for his personal occupation or for occupation of his dependants.

18. It appears that a similar provision exists in Delhi Rent Control Act, 1958. In ***S. S. Gupta versus M. C. Gupta – AIR 1999 SC 2507,*** which was a case under Section 14 of the said Act the Apex Court has held that ***'bona fide or genuine need'*** of the

landlord or that the landlord ***'genuinely requires'*** or ***'requires bona fide'*** accommodation for occupation by or for use for himself is an accepted ground for eviction.

19. Accordingly, I am of the view that the bona fide need on the part of the landlord having been established for seeking the eviction of the appellant there is no legal infirmity which vitiates the finding of the learned trial Court on the question of bona fide requirement and the decree passed thereof.

20. The next submission made by the learned counsel for the defendant/appellant while dealing with the issue relates to comparative hardship. The question to be considered, according to him was who will suffer more – the plaintiff or the defendant if the suit is decreed. In this case, the defendant/appellant who is unemployed has been living in the suit premises since the year 1992 and if eviction is ordered, she will suffer hardship far more greater than the plaintiff/respondent and in view of this position, no decree of eviction would be justified. For this submission the learned counsel referred to and relied on the decision of the Hon'ble Supreme Court in ***Baba Kashinath Bhinge versus Samast Lingayat Gavali & Others 1994 Supp(3) SCC 698.*** It has been laid down in this case that if the Court is satisfied that having regard to the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused to

the tenant by passing a decree then it may refuse to pass a decree of eviction. It is however to be noted that this decision is based on a specific provision contained in ***Sec.13(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947*** which is as follows :-

> ***"13.(2) No decree for eviction shall be passed on the ground specified in clause (g) of sub-section (1) if the Court is satisfied that, having regard to all the circumstances of the case including the question whether other reasonable accommodation is available for the landlord or the tenant, greater hardship would be caused by passing the decree than by refusing to pass it."***

It is pertinent to mention that no provision identical to the above exists in the Gangtok Rent Control and Eviction Act, 1956 and as such the existing provisions hardly require the question of comparative hardship to be considered. However, even if the question of comparative hardship were to be considered, that hardly seems to change the situation in the present case. As noted above, the plaintiff-respondent has been found to establish his case of bona fide requirement. It has been held by the apex Court in ***B. B. Patil versus Md. Gudusaheb 2003 AIR SCW 1027*** which is a case under Karnataka Rent Control Act 1961 that, once the landlord establishes his need to occupy premises for his personal use and occupation the question of hardship has to be decided in favour of the landlord. This decision also lays down

10/7/09

that where the comparative hardship that may be suffered by the landlord, will be greater than that of the tenant than what little hardship that may be suffered by the tenant can be mitigated by granting longer time to vacate the suit premises. Thus the submission made in this regard is of little avail to the defendant-appellant.

21. The further point raised by Shri A. K. Upadhyaya, learned counsel for the defendant/appellant was that, the notice, Ext.P1 issued by the plaintiff terminating the tenancy of the defendant was, not in conformity with the requirement of Section 106 – Transfer of Property Act. It is his contention that under Section 106 T.P. Act, a 15 days notice expiring with the end of the month of the tenancy was the requirement of law, whereas the period given in notice, Ext.P1 does not expire with the end of the month of the tenancy. Accordingly, it was his submission that the notice issued by the plaintiff/respondent terminating the tenancy was not a valid notice. The learned counsel relied on the decision of ***Karnataka High Court in Francis Jerone Fernandis versus Anthony Pedad Cardoza – AIR 1984 Karnataka 226.*** It was held in that case that a notice giving mere 15 days time by itself will not answer the requirement of Section 106, but it must also indicate that the 15 days period must expire with the end of the tenancy month. The position of law as spelt out above is undoubtedly in conformity with the provisions of Sec.106 T.P. Act. It, however, appears that the provisions of Section 106 T.P. Act is

not attracted where there is a local law or usage. It may be noted that within the town areas in Gangtok tenancy right in respect of residential premises is governed by Gangtok Rent Control and Eviction Act, 1956 and this Act does not provide for issue of notice for terminating the tenancy. No doubt there were differences of opinion among different High Courts in the past regarding the requirement of issue of notice under Section 106 T.P. Act even where there were local laws. However, the Hon'ble Supreme Court in ***V. Dhanapal Chettiar versus Yesodai Ammal – AIR 1979 SC 1745*** by a judgment of the 7 Judges bench, overruled number of its earlier decisions and several rulings of the High Courts and held that in order to get a decree or order for eviction against a tenant under a State Rent Control Act, it is not necessary to give notice under Section 106 T.P. Act. It has been observed that determination of the lease in accordance with the T.P.Act is unnecessary and is a mere surplus-age because the landlord cannot evict the tenant even after such determination of the tenancy. Thus making out a case under the Rent Control Act for eviction of the tenant is, by itself sufficient and it is not obligatory for the proceedings to be founded on the determination of the lease by notice under Section 106 of the T.P. Act.

22. In view of such clear position of law as laid down by the Hon'ble Supreme Court, as indicated above, the question of validity or invalidity of the notice, Ext.P1 issued by the plaintiff/respondent in the present case need not detain us any

further and the contention raised by the learned counsel is accordingly answered in the negative.

23. It was also submitted by Shri Upadhyaya that the plaintiff-respondent had let out other premises also in the same building but had not indicated in the pleading or in the evidence as to why only the premises in occupation of the defendant-appellant were suitable for him. It appears that such a question came up before the Hon'ble Supreme Court in **Savitri Sahay vs. Sachidananda Prasad AIR 2003 S.C. 156** which was a case under Sec. 11 of the Bihar Buildings (Lease, Rent and Eviction Control) Act 1983. Based on the provisions contained in Explanation II to Rule 11, it was held that it was not open for the tenant to question preference exercised by the landlord. The said provision specifically provides that where there are two or more premises let out by the landlord, it will be for the landlord to choose which will be preferable to him. Here again it has to be observed that such a provision has not been incorporated in the Gangtok Rent Control and Eviction Act, 1956. It is, however, plain that even if there were such a provision and the defendant-appellant were to avail of it she would not be allowed to question the preference exercised by the plaintiff-respondent in the case at hand. Therefore, the contention would be of little avail to the defendant-appellant.

24. This brings us to the point relating to substantial alteration and addition effected by the defendant in the suit premises pressed by Shri Hamal the learned Counsel for the plaintiff/respondent in

all seriousness. The contention of the learned counsel in this regard is that the defendant/appellant in this case had also substantially altered and changed portion of the suit premises without any permission of the plaintiff/respondent and on this ground alone, the defendant/appellant was liable to be evicted as per the existing provisions of law. The stand taken by Mr. Upadhyaya the learned counsel for the defendant/appellant, on the other hand, was that the decree of eviction having been passed only on the basis of the finding on bona fide requirement he was not required to make any submission in this regard. However, if it were held otherwise the learned counsel stated that his contention would be that the defendant appellant had only renovated the suit premises and the same could not be taken as alternation or addition to the premises. It will be seen from the discussion that follows that the above submission of Shri Upadhyaya would be untenable.

25. It appears that the defendant/appellant has admitted both in the pleading and in her evidence that she had substantially altered and changed the suit premises as alleged. The plaintiff/respondent in his affidavit evidence has stated that the defendant has also materially altered the suit premises by erecting partition walls. This statement of the plaintiff has gone unchallenged in his cross-examination. In paragraph 13 of the WS it has been stated that the defendant had renovated the entire

premises which took her 3 months and cost her Rs.45,000/-. In her cross-examination she has stated as follows :-

> ***"It is true that I have effected a major repair in the suit premises for which I have not taken written consent from the plaintiff."***

Giving her reasons for not taking the consent of the plaintiff, she has further stated :-

> ***" I have not taken the permission from the plaintiff as I have not been his tenant."***

26. The above would, therefore, show that the defendant has admittedly made additions and alterations to the suit premises without the approval of the landlord as alleged.

27. Section 12 of the Gangtok Rent Control and Eviction Act, 1956 which provides for additional ground of eviction of a tenant is as follows :-

> ***"No tenant shall make any additions or alterations to the building , or damage the structure in any way, save in the course of ordinary wear and tear, without the approval in writing of the landlord, failing which the landlord shall have the right to evict such tenant."***

28. As per the above provision, a tenant can make additions or alterations to the suit premises only with the approval in writing of the landlord and if there is any addition or alteration without such approval, a tenant makes himself liable to be evicted. It is the admitted position in the present case that the additions and

alterations made by the defendant in the suit premises includes erection of a partition wall. Thus it cannot be denied that the defendant-appellant did not make any addition or alteration to the suit premises without the approval of the landlord. This satisfies the requisite condition laid down in Section 12 of the Gangtok Rent Control and Eviction Act, 1956 and the plaintiff/respondent must be taken to have established the ground for eviction of the tenant from the suit premises under this section as well.

29. It would, therefore, appear from the above, that the defendant/appellant has also made herself liable to be evicted on account of additions and alterations made by her in the suit premises without obtaining written approval of the landlord.

30. It is thus clear that the plaintiff/respondent has established his case for eviction on the ground of bona fide requirement under Section 4 and also on the ground of unauthorized additions and alteration to the suit premises under Section 12 of the Gangtok Rent Control and Eviction Act, 1956.

31. Lastly, one more aspect of the matter that requires to be dealt with, is the further submission made by Shri S. S. Hamal regarding limitation. His contention is that the present appeal was filed after the expiry of the prescribed period of limitation. According to him, the impugned decree having been passed on 29.9.2003, the memo of appeal ought to have been filed by

28.12.2003. However, the appeal was filed only on 15.7.2004, and, as such, there was a delay of 200 days for which there was no clear order granting condonation of delay. Admitting this position, Shri A. K. Upadhyaya submitted that the appellant had explained the delay in the condonation application filed along with the memo of appeal. According to the statement contained in the condonation application, the delay was caused on account of the fact that the appellant had to be in judicial custody w.e.f. 29.10.2003 to 20.5.2004 for serving the sentence passed by the learned Court of the Chief Judicial Magistrate (E&N) in Criminal Case Nos.13, 16, 36 and 69 of 2003 and immediately after her release on 20.5.2004 she had to take medical treatment for arthritis and blood pressure. This, according to him, was sufficient cause and as the appeal was admitted and interim stay of further proceedings in the related Civil Execution Case No.4 of 2004 was granted the delay was impliedly condoned.

32. I have perused the condonation application. In my considered view the appellant has shown sufficient cause and has given cogent reasons for condoning the delay in filing the appeal. It is clear that because of the facts and circumstances as highlighted by the appellant in the condonation application, the appellant was prevented from filing the appeal in time. Therefore, the delay should be taken to have been condoned.

18/11/09

33. For the reasons stated above, I am of the view that there is no merit in this appeal. Accordingly the impugned decree is affirmed and the appeal is dismissed. However, keeping in view the hardship that would be caused to the defendant/appellant, three months' time is allowed to her to vacate the suit premises.

10/11/09

(A. P. Subba)
Judge

Dictation taken
and
typed by me

Aunku Tshering.

HIGH COURT OF SIKKIM
GANGTOK.

DECREE IN APPEAL
(Under ORDER 41 Rule 35 of C.P.C.)

The Regular First Appeal No.02 of 2004 against the decree of the Court of District Judge,(East & North) at Gangtok dated 29.09.2003 in Civil Suit No.20 of 2003.

Meena Thapa,
W/ o K.B.Pradhan,
R/o Development Area,
P.O. & P.S. Gangtok;
East Sikkim .... Appellant.

Versus

L.B.Pradhan,
S/o Late Kabi Raj Pradhan,
R/o Development Area,
P.O. & P.S. Gangtok,
East Sikkim .... Respondent.

This appeal coming on for hearing on this 13th day of October, 2004 before this Court in presence of Shri A.K.Upadhyaya, S.Pradhan and S.Lama, Advocates for the appellant/defendant, Shri S.S.Hamal & Norden Tshering, Advocates for Respondent/Plaintiff it is ordered that the appeal be and the same is hereby dismissed and the impugned decree is hereby affirmed. However, keeping in view the hardship that would be caused to the appellant three months time is allowed to the appellant to vacate the suit premises

Given under my hand and seal of the Court on 10th day of November 2004 at Gangtok.

Prepared by

10/11/04.

Assistant Registrar (J)
High Court of Sikkim,
Gangtok.

Registrar General
High Court of Sikkim,
Gangtok
10/11/2004.